

THE ICC, INTERNATIONAL CRIMINAL JUSTICE AND INTERNATIONAL POLITICS

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Introduction

The International Criminal Court (ICC) which came into being as a result of a desire by the international community to establish a permanent body rather than the *ad hoc* tribunals that had become the norm since the Nuremburg and Tokyo tribunals launched the world on the path of international criminal justice. The coming into force of the Rome Statute in 2002 signified to many the end to impunity and the advent of a culture of accountability because, it was believed, the ICC was going to create a deterrent effect on crimes of genocide, crimes against humanity, war crimes and crimes of aggression. The euphoria that greeted the establishment of the International Criminal Court (ICC) has been dampened somewhat by experience of its first twelve years, into measured optimism regarding its impact on international criminal justice.¹

The slowness with which the court has moved in concluding cases has diminished its ‘bogeyman effect’, for it was only on the tenth anniversary of its existence that the ICC passed its first judgment², and its second, two years later.³ With a track record of two convictions in twelve years and the lack of cooperation on the part of states to arrest and surrender indictees, the ICC appears to be a giant on clay feet. As if it did not have enough on its plate, it has come up for criticism for its apparent lack of even-handedness in its operations. Critics maintain that its focus seems to be restricted to Africa, and this has created a feeling among many Africans and African leaders that it has deliberately targeted African leaders, considering the fact that it appears not to show as much interest in abuses going on elsewhere, as in Africa.

Clearly, for all of the reasons mentioned above as well as others discussed below, the need to end impunity by developing mechanisms of accountability on the international plane has not been fulfilled by establishing the ICC. Africans still appear to live lives that are “nasty, brutish and short” at the hands of their governments, and increasingly at the hands of non-state actors when the state’s inability to protect its citizens leaves them at their mercy.

Buffeted in its operations by international politics, is the ICC's weaknesses a function of its very nature or externally-imposed? Does it have a future? Is there a need for Africans to look beyond the ICC for protection from their own, and for ending impunity in a decisive manner?

This write-up is a thinking aloud, on the problem of protecting Africans and the processes or institutions that would best serve the purpose beyond the ICC.

A brief on International Criminal Justice

The commission of egregious abuses during WWI when strategies adopted by the German Kaiser in an attempt to secure victory over the Allied Powers, as well as during the 1915 Turkish campaigns against the Armenians, exposed a need for action to be taken against war crimes, and led to proposals for the establishment of international criminal processes.⁴ Subsequently, the Leipzig War Crimes Trials(1921) set the precedent for trying war criminals. However, it was the Nuremberg (1945-1946) and Tokyo (1946-1948)⁵ trials laid the foundation for contemporary International Criminal Justice. Nuremberg produced a set of principles to end impunity and establish a framework to guide accountability. These Nuremberg Principles have become a beacon in international criminal justice and provide that there can be criminal responsibility under international law for the commission of listed crimes even if the domestic law of a particular state does not impose such liability. It is further established that there can be personal responsibility even if the person acted in an official capacity, such as president or head of state, or acted under orders of a Government or political superior, especially if the circumstances made it possible for a moral choice to be made. The Nuremberg Principles listed what crimes were punishable under international law and affirmed the right of anyone accused of those crimes to a fair trial.⁶ Ultimately, the Principles established that intrusion of international law into the domestic legal terrain i.e. subordination of national sovereignty to higher principles of ensuring sustainable peace and respect for human rights in every corner of the globe, was a necessary evil if humankind was to “be saved from the scourge of war”.

These principles have set the world on a trajectory which made the establishment of first the ad hoc tribunals, starting with the International Criminal Tribunal for the former Yugoslavia (ICTY)⁷, made the establishment of a permanent criminal court the culmination of efforts to institute international criminal justice as a means of promoting political accountability on the international plane. Undoubtedly, all of the special tribunals, howsoever

called, created between 1993 and 2005 have not only contributed to the establishment of the ICC, but also to the jurisprudence of international criminal justice.

The ICC

The ICC is “the first permanent, treaty based, international criminal court [was] established to help end impunity for the perpetrators of the most serious crimes of concern to the international community.”⁸ The need for such a court was evident when it had become clear that to enforce universal human rights standards and demand accountability from those who breached same, setting up judicial bodies that operated under a perception of victor’s justice, with all the attendant animosity that is projected unto its work did a disservice to humanity. Again, it had become clear that in instances when egregious offences had been committed by a state, or public officials of high standing, its national courts were unwilling or unable to act to punish such perpetrators. Thus, when the International Law Commission (ILC) was constituted under the auspices of the United Nations (UN) to prepare a Draft Code of Crimes Against the Peace and Security of Mankind as well as the draft Statute for an international criminal court, the global community’s enthusiasm to establish an International Court to try genocide, crimes against humanity, and war crimes had been fully expressed.⁹ The eventual adoption of the Rome Statute, made the ICC the first tribunal to be established under an international treaty with equal participation of all states, and to operate as a separate and independent entity within the international system.¹⁰

Jurisdiction

The jurisdiction of the ICC is activated in three broad contexts; *ratione materiae* (crimes that can be tried by the court): the main crimes that can be tried by the Court as stated in Article 5 of the Rome Statute of the ICC ie the crime of Genocide, Crimes against humanity, War crimes, the crime of Aggression and now rape as an instrument of war. *Ratione personae* (persons who can be tried by the court): ie persons over 18 years of age at the time of commission of the crime; and *ratione temporis* (the “timeframe” within which the crime was committed).

The ICC does not have universal jurisdiction,¹¹ though it has been clothed with the capacity to exercise jurisdiction over international crimes.¹² Article 12(1) provides that , “A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with

respect to the crimes referred to in article 5.” This thus limits the jurisdiction of the ICC to the territory within which the crime occurred and the nationality of the perpetrator. By implication then, any state that is not a signatory to, or has not ratified the Rome Statute is at liberty to commit international crimes within its territory without fear of prosecution. Sudan and the United States appear to be in just such categories. In spite of the fact that Sudan is a signatory, Omar Al Bashir, President of Sudan and an ICC indictee continues to enjoy the protection of the Sudanese government and has failed to report to the ICC despite the two warrants issued against him. At the other end, with the US not a member of ICC, a number of persons have announced their intention to get the ICC to investigate and try Mr George Walker Bush, the former President of United States, for war crimes but have achieved no traction. Clearly then, although the Security Council, of which the US is a leading member, and which has called on all States to co-operate with the ICC has little moral authority to do so.

The ICC and International Politics

The Court has, so far, concluded the trial of two persons and has a number of others yet to be brought to trial. Its facilities have been put to use by some of the earlier ad hoc tribunals and these trials have erroneously been attributed to the ICC. Indeed many people who accuse the ICC of anti-African bias often cite the case of Charles Taylor as one of the instances. Yet Charles Taylor was tried by the Special Court of Sierra Leone, which borrowed the ICC’s facilities so as to prevent destabilisation of the sub-region by a the trial of a former president of a neighbouring country.

Sovereignty

The impact of ‘sovereignty’ on the proper functioning of the ICC cannot be overlooked or glossed over. Viewed by a school of thought as the enemy of international law, ‘Sovereignty’ constitutes an integral part of the ICC’s founding treaty, and cannot be wished away. First, the fact that the ICC is made up of State Parties means that respect for sovereignty is the very basis of its existence; second, its principle of complementarity is a recognition of the State’s dominion when it comes to asserting and exercising criminal jurisdiction; and third, in terms of how it may acquire jurisdiction, it has to depend on the willingness of State Parties to refer cases to it, and to assist it to gather evidence, etc. Therefore, its inability to proceed without doing obeisance to ‘sovereignty’ makes it hostage

to its demands, and is responsible for some of its difficulties. It is conceded that the whole idea of the ICC, goes somewhat contrary to Westphalian norm as it presents itself as a “superior”, but the establishment of special international tribunals in earlier times was not less of an intrusion by the international community, yet no harm was done to the stature of ‘sovereignty’ as recognised under international law. The real problem is then, is not how much its existence undermines notions of sovereignty, but how much its operations may be shaped by it, i.e. how it determines whether international criminal justice can operate in a particular territory or not. The states are free to subscribe or not to subscribe to membership with consequences exemplified by the failure of the United States, Russia and China to accept the jurisdiction of the ICC, with no cost to them. Indeed, as P5s of the Security Council, they have engaged in referrals to that court to which they do not subscribe, and yet do not feel it a moral incongruity to do so.¹³

Funding

“He who pays the piper calls the tune” is an aphorism whose truth is demonstrated on a daily basis in the arena of international criminal justice. Criminal Justice is expensive to run, and International Criminal Justice even more so. Therefore those who provide the funding shape the operations of the ICC, as its funding situation determines what, and how much, it can do. It is acknowledged that setting up a permanent court was to avoid the perception that rich countries fund the court to deal with persons they desire to punish, yet the reality has not undermined this perception. The fact that the ICC lacks the capacity to exercise jurisdiction over all crimes within its remit committed within the territory of all of its member states, except what the international community is willing to fund, cannot be denied. Coupled with the fact that the ICC’s staff capacity is small, and it does not have its own police force or correctional facilities, it has, of necessity, to rely on States’ Parties to arrest and surrender suspects, the ICC is hobbled in the achievement of its mandate. Worse, since most governments would be averse to surrendering their own public officials, or persons aligned with the government, or who remain powerful in the state,¹⁴ the creation of a perception of lopsided justice has been inevitable.

The very mode and nature of the court makes it a political animal that can never escape from its roots. The range of its jurisdiction as well as its subject matter puts it squarely in the arena of international politics, so how can it escape such external factors? At the same time, it has to limit the effect of such factors if it is to remain credible. Indeed the

determination of who can be tried by the court as well as for what crimes is a political question and can only be determined by the influence of international politics.

The range of persons liable to be tried by the ICC excepts none but minors. This means that all persons over 18 years in a particular territory, however powerful - and this could range from heads of states/presidents/ prime ministers through to powerful warlords – are triable by the ICC as the Kenyan case exemplifies. This can create tremendous difficulties when it involves a sitting Head of State or other powerful individual. What more is calculated to invite international politics than efforts to hold accountable the most important individual in a particular state?

Again, the (accused) national's state must be willing to accept the ICC's jurisdiction and even in a situation where the person's crimes were committed after the Statute came into force on 1st July 2002, but before that person's State joined the ICC, that state, though only subject to the court's jurisdiction in respect of prospective crimes, may agree to the court exercising jurisdiction with retrospective effect.¹⁵ This is a fact situation calculated to draw the court into politics of attrition in a particular state, or victors' justice, and consequently mire it in international politics. Here is the reason why: it is unlikely that a government would hand over one of its own members, and cooperate with the ICC to see the trial through. It stands to reason that it would be only those who had fallen out of favour with their governments who would be given up in this manner.

Further, the categories of who can make a referral to the court puts its operations squarely into the lap of international politics – particularly as regards Security Council referral (with support from the P5) and through *proprio motu* powers of the Prosecution. As will be established later, whatever inconsistency the ICC stands accused of, may be a function of these two modes for invoking its jurisdiction.

Another reason why the court's own nature makes it both a creature and victim of international politics is to be found in operation of the principle of complementarity¹⁶ which has it that the ICC's duty is to complement national courts in prosecuting international crimes, and therefore it is only when national institutions are unwilling or unable to properly investigate and prosecute crimes of the nature set down in Article 5 that the ICC could intervene as a last resort. This certainly, makes the court an arena for international power play, for the issue of when this determination or inability gets assessed is itself productive of

power play. Thus, depending upon how a case lands in the laps of the ICC, it may be indicative of a powerful nation's belief that the national authorities are unwilling or unable to take action, or national authorities who find it a convenient means to deal with political opponents.

External / Internal Factors

Apart from the political issues that inhere in the very nature of a judicial tribunal of an international nature, there are other factors that have impinged on the work of the ICC, and that have, on occasion, threatened to swallow it up completely.

Perception of Selective Justice

A perception of selective justice has dogged the work of the ICC, and undermined its image as a fair and impartial forum for the administration of international criminal justice. This perception has been the product of events external to the ICC, and events within its own operations. First, the failure of majority of the Security Council's P5 members to sign up for the court and to be subject to the jurisdiction of Court is the Achilles' heel of the court. Why have those who are providing funding for the court, and who have the power to refer cases to the court not signed up and subjected themselves to its jurisdiction? Is it only poor and weak states whose conduct can invoke international criminal justice? The undeniable conclusion is that by limiting the ability of the court to operate in the arena of the powerful, a perception of its helplessness in the face of powerful nations, has been sown. The unfolding events within the Security Council, where Russia and China vetoed a Resolution on 22nd May 2014, to refer both sides of the Syria crisis - the Assad regime and Opposition elements - to the Court¹⁷, will only reinforce the perception. This is against the backdrop of the fact that earlier that same month, Russia was threatening the interim administration of Ukraine with just such a referral for moving against pro-Russian separatists in eastern Ukraine, leading to the deaths of a few insurgents. How can atrocities committed in Ukraine be considered grave enough for the attention of the ICC when a Resolution based on reports of the UN on the situation in Syria are considered worthy of a veto? There is thus the inescapable conclusion that it is international politics that determines who gets referred by the Council to the ICC, and but one's vulnerability occasioned by being geo-strategically unimportant, and therefore without a friend among the P5 powers. It again reinforces the view that it is not egregious conduct

that amounts to crimes as provided under Article 5 alone, that can secure a referral by the Security Council. No wonder every continent wants a permanent seat on the Council!

Perception of victor's justice

The era of ad hoc tribunals having produced a perception that such tribunals were an exercise in victor's justice rather than real justice, the notion of a permanent tribunal was to address just such a perception. However, the ICC by some of its own decisions has done nothing to rid itself of this historical baggage. For instance, in deciding to summon Uhuru Kenyatta, then an opposition leader, but not Raila Odinga in the Kenya, and in bringing an indictment against Laurent Gbagbo, a defeated leader in the 2010 elections and ensuing crisis in Cote d'Ivoire, but not his rival Alassane Ouattara, now sitting president, what conclusion is any observer to draw? Such perceptions, when nourished by events that are hard to explain away, have a tendency to undermine the *raison d'être* of a permanent court, as well as the brand of justice it dispenses.

ICC insensitive to national/cultural realities?

The Sudan and Kenya cases brought into sharp relief the issue of whether there can be peace without Justice, and re-ignited the debate on whether justice can be obtained even at the expense of peace or whether the peace must be maintained as a priority, even if it means postponing justice. When an arrest warrant was issued against Omar al- Bashir, president of Sudan, after he was indicted by the ICC, the AU, horrified by the fact that a sitting president had been indicted, sought to intervene by asking for a deferral, citing the need to sustain the peace in Sudan. It further argued that in view of Omar al- Bashir's potential role as an interlocutor in the reconciliatory process in Darfur, prosecuting him would be subversive of peace.¹⁸

In the Kenya case, the situation was not that different. Following the election of Kenyatta and William Ruto as President and Deputy President respectively, the prospect of seeing a sitting president and deputy president on trial before the ICC for crimes committed before their election looked positively unattractive. The parties themselves, having submitted to the ICC, began to press for a deferral till after they had served their term of office. Following their own unsuccessful attempt, they roped in others, first the Parliament of Kenya, then the East African States which then called on the AU to take a stand on the matter. The AU then passed a Resolution supporting the request by East African States for

the cases against the President and Deputy President to be dropped in favour of a “national Mechanism to investigate and prosecute the cases under a reformed judiciary provided for in the new constitutional dispensation.”

As in the Sudan case, the AU based its request on the need to “prevent the resumption of conflict and violence in Kenya”; and by suspending efforts to demand accountability, to thereby support on-going peace building and national reconciliation processes. The AU Resolution went on to express concern that the indictment of the president and deputy president posed a threat “to on-going efforts in the promotion of peace, national healing and reconciliation, as well as the rule of law and stability, not only in Kenya, but also in the Region”. The AU also went further to endorse the request of the East Africa Region for the ICC to yield up jurisdiction in favour of a national mechanism on grounds of the principle of complementarity. Surely this was a strange argument, for those two positions advocated were in themselves contradictory: if a trial could not go on in an international forum for fear of disrupting peacebuilding efforts, then how could a national court proceed in like manner without similar effect? Again, the position appeared to overlook the sequence of events, because the ICC took charge of the case only after national processes had failed to do so. Was this request by the East African States and the AU grounded in good faith? This event has not only undermined the ICC, but has also called into question the AU’s avowed aim of dealing with impunity.

Other questions go beyond this position, into states treaty obligations under international law. Was not the attempt by the East African States to get AU member states to pull out of the ICC *en bloc*, not tantamount to using “street-tactics” ? Was this not international politics at its best, when states which had signed onto the ICC as individuals and had thereby pledged their cooperation were seeking, in violation of their treaty obligations, to block the work of the ICC by ganging up against it? If the effort to coerce the ICC into acceding to their demands by making its position politically untenable was not international politics at play, then nothing else could be. African states voluntarily agreed to subject themselves to the jurisdiction of the Court and must use dialogue to press home their concerns, and not by acts that would be in violation of their treaty obligations.

Exercise of prosecutorial discretion and perception of Anti-African bias

The OTP's concentration on economically and politically weak African States is also perceived as bias against Africa. It is an incontrovertible fact that since the establishment of the Court, all the investigations pursued by the Office of the Prosecutor are in Africa: Sudan, Democratic Republic of Congo (DRC), Cote d'Ivoire, Guinea, Kenya, Uganda, Central African Republic (CAR), Mali and Libya. The former chief prosecutor of ICC, Moreno Ocampo was perceived as exhibiting an anti-African bias because of his persistence in issuing arrest warrants to Africans only, during his time in office, the first nine years of the Court's existence. It is said that on account of the fact that six of the thirty prosecutions he launched have either been withdrawn, dismissed or led to an acquittal, he had an agenda against Africans, as the withdrawn, the dismissed and perhaps the acquitted warrants may have lacked merit. Such a record in criminal jurisdiction is not unusual, but it is the fact that no one else outside Africa has come up for attention, that has fuelled the perception. Perhaps Ocampo was anxious for the court to start work and justify its existence and the huge expense of its operations, that he was less than careful in his choice of cases. Perhaps he was playing to the gallery in attracting attention to himself and *kow-towing* to sensationalism in the choice of case.

Whatever the explanation, the perception of an anti-African bias in its operations has become a major obstacle to the image and operation of the Court. Perhaps African leaders have also sought to play politics with the court and this having been resisted, has been viewed as an indication of anti –African bias. Had no events happened elsewhere which should have triggered an attempt at investigation, perhaps Africans and their leaders would have had no reason to accuse the ICC of bias, but this has not been the case. Therefore those with an axe to grind have not been slow in arriving at the conclusion that the court is indulging in politics and pandering to the whims of powerful states, and becoming an instrument to deal with leaders who have become unpopular with those powerful interests. This situation has been damaging as it has rendered the once-supportive African States who constitute the largest grouping within the Assembly of States Parties (ASP), hostile to it, leading to the adoption of an unhelpful stance of non-cooperation towards the ICC.¹⁹ Regardless of the fact that the Court was not established to prosecute only Africans, one cannot overlook the fact that, focusing on Africa served the political interests of both local and international parties. At least the bogeyman threat of a referral to the ICC seems to have an effect on some African leaders intent on pursuing their own interests at the expense of their civilian populations.

The perceived ineffectiveness of the Pre-trial Chamber

An examination of issue of Ocampo's predilection, in retrospect, also raises questions about the role of the Pre-Trial Chamber as well. Where was it when all those "faulty" indictments were being issued? Did it fail in the discharge of its duties or did Ocampo ignore the standards of procedure for judicial proceedings in the Court?²⁰ Now that a case against British soldiers has found its way to the court,²¹ the mode of handling would determine how the issue of anti-African bias would be addressed (or reinforced).

Apparent inadequacy of Witness Protection programme

Every prosecution lives or dies by the quality of its evidence. Thus witnesses are critical to any successful prosecution, hence the need to establish witness-protection programmes to protect those who would be willing to testify, particularly for the prosecution. However, it would appear that its witness protection programme is not effective in addressing the challenges a court such as the ICC has to surmount in-country, to encourage potential witnesses to step up and testify. For instance, in the Kenyan case the Victims and Witnesses Unit of the ICC appears to be asleep at the wheel. There have been clear violations of Articles 68 and 70 in the processing of charges levelled against Uhuru Kenyatta - President of Kenya, William Ruto, Deputy President of Kenya, and Joshua arap Sang, a journalist. The three were invited before the Court for their critical roles in the 2007 Kenyan post-election violence. Human Rights Watch reports "Seven potential witnesses have been killed and others have apparently recanted their testimony."²² The interference with witnesses has been so blatant that an arrest warrant has been issued by the ICC against Walter Barrasa, an associate of Uhuru Kenyatta, for attempting to disrupt the Court's investigations by "influencing" witnesses, contrary to Article 70 of the Statute as he is reported to have offered bribes to two witnesses, and made efforts to bribe a third witness in exchange for withdrawing from testifying.²³ With such manoeuvring by associates of the defendants to deprive the case of credible evidence through attacking the witnesses, a more robust Witness Protection programme should have been put in place. No wonder witness after witness has pulled out or refused to cooperate. At this rate, there will be no witnesses by the time Kenyatta is put before the Court.

Of course, judging by the issues arising from the Kenyan's example, there are other practical challenges the Court faces, such as, when does witness protection begin? Does it begin when investigations are underway or after an arrest warrant has been issued? Or should

it be limited to the period just before or during the trial? When it comes to witness protection in communal societies such as Africa, with its extended family system there may be issues as to who the witness protection programme can cover, and who it cannot. Is the concept being implemented by the ICC sufficiently sensitive to communal societies or only as devised and understood in Western culture with its emphasis on individualism? Whatever the practical problems are for the ICC, the failure to mount an adequate witness protection programme victimises the victims once again, and makes the court complicit in needlessly reopening old wounds, or worse, leaving the victim at the mercy of the powerful and often ruthless perpetrator (s).

International politics is not a one-way street, and so the attempt to make use of the Court to State's or politician's own advantage is also unavoidable. It has become apparent that African leaders comply with the directives of the Court or assist in investigations only when it suits them. There is enough reason to suppose that sometimes, assistance is provided in exchange for exemption of the political allies or to save themselves from future prosecution. Such is the experience with DRC, Uganda and even Cote d'Ivoire. For instance, in the first-ever self-referral, in 2003, the President Yoweri Museveni of Uganda, was all too willing to cooperate with the ICC to find Joseph Kony, the infamous leader of the Lord's Resistance Army. The ICC's investigations in Northern Uganda that began in January 2005, was bound to implicate both the LRA and the Ugandan People's Defence Force (UPDF). Yet, when in 2005, arrest warrants were issued against five LRA leaders no member of the UPDF was implicated in atrocities committed against their own people for the last 25 years. Could it be that assistance provided to the Court had made Museveni's government beholden to it? Bearing in mind that Uganda's referral to the Court was conspicuously marked by Museveni and Ocampo appearing in a joint conference in London and sharing a solidarity handshake, there was little surprise that right seemed to be all on their side and all wrong on the LRA's. Museveni's current hostile posture against the ICC is perhaps born out of the Court's failure to yield to his demands and a fear of future prosecution.

The Future of the ICC

Much of the ICC's future prospects would depend on the full and reliable support of States Parties. Nurturing and retaining such support would in turn depend on whether or not the ICC is perceived to be able to demand the same accountability and justice from the West

as it does Africa.²⁴ Despite its political realities, the ICC should strive to establish itself as an independent Court concerned with prosecuting all international crimes by whomsoever committed and not just one that has fixed its eye only on those committed by Africans. The future of international criminal justice will depend upon the willingness of the powerful states to continue to provide funding, and be seen to be willing to subject themselves to the court for whose operations they provide substantial sums of money.

Maintaining a dialogue with AU and Africans

With recent calls by AU to member states not to cooperate with the ICC, the concern is that the ICC may suffer a similar fate as the League of Nations, and should therefore engage in focused dialogue with AU, to address the concerns of Africans and their leaders. The swiftness with which the Extraordinary Chambers inaugurated in February, 2013 moved to charge and place Hissene Habre in pre-trial detention bespeaks an attitude of wanting to exhibit Africa's willingness to deal with impunity, years after dilly-dallying and shilly-shallying by Senegal. The ICC faces grave opposition from AU member states, and this has produced the decision to expand the jurisdiction of the African Court of Human and Peoples Rights to give it criminal jurisdiction in a bid to develop "African mechanisms to deal with African challenges and problems."²⁵ However, the expanded jurisdiction need not be seen as undermining the operations of the ICC. The two bodies need not be mutually exclusive, and Africa has put itself under a heavy burden to show that establishing their court is not just a means to evade accountability. In any case AU is so donor-dependent, that it would do well to dialogue with the ICC and to remain on cordial terms with that body, as it is unlikely that those whose funds support both institutions, would provide funding which would have the effect of undermining one or other of the institutions. The non-availability of funding might make the idea still-born, though its value in upholding Africa's determination to improve accountability of leaders for abuses that occur under their authority is immeasurable.

Developing capacity of National/Continental courts

Primarily, the ICC's role is not to replace national courts but to complement them.²⁶ Partnering national governments to prosecute will create greater impact in terms of reach, timing and timeliness. It would also put less stress on the limited resources of the court. Such partnership would also help develop national capacity and so provide a dividend thereafter, to the citizenry in the form of better administration of justice. It would therefore be in the

interest of the court to assist in developing the capacity of national and continental courts so that complementarity may have true meaning.

Increasing Public Outreach

The work of the ICC requires reaching out to the public in all its member states. Therefore its engagement with Civil Society Organisations (CSO)s and Non-Governmental Organisations”(NGOs) in Africa is a critical factor of success.

Such outreach should include an affirmation that the Nuremburg principles require that everyone accused of such crimes should have a fair trial; and that they cannot cede the moral high ground on the altar of expediency. This should help explode the myth that international courts in maintaining scrupulous respect for the human rights of those on trial, only end up cozening and pampering people who had scant regard for other people’s human rights when they had power over them.

Effectiveness of such engagement with the public can be facilitated in no small measure by CSOs. The growing importance of Civil Society in development and related issues has made engaging them very crucial. Their collective reach is much more extensive than any international institution could hope to achieve, and working with such CSOs as the Coalition for the International Criminal Court (commonly known as CICC) would create an avenue for many of the misconceptions regarding the ICC to be addressed. To begin with NGOs played important roles in rallying support for the ratification of the Rome Statute, and so their strengths can be harnessed again. Indeed, Africa’s civil society played an immense role in trying to resolve the rift between the AU and the ICC, and is currently engaged in ensuring that the amended jurisdiction of the African court would not include any protocols that would be inimical to the exercise of international criminal justice.²⁷ This track record means that no one need counsel the court to maintain a close working relationship with NGOs and CSOs who are known to be credible.

Conclusion

The watchdog/deterrent role or ‘bogey-man effect’ of the ICC appears not to have been achieved, though admittedly the impact of the Court was always going to be more symbolic than real, considering the number of people it could try out of the class of those who may have committed atrocities in any particular conflict. It must however be conceded that

International Criminal Justice has come a long way, and has made notable strides. Perhaps, but for the influence of international politics it would have made even more. However, since no creature can escape its real nature, international politics will always be a potent factor in its operations, for it is itself, a creation of international politics.

The future of the ICC depends largely on its ability to maintain good working relations with all member states by being perceived not to be pandering to the wishes of those who have chosen to stay outside its membership, yet want to direct its work. Unless it works on this perception that it is not independent, it will not regain the affection it once had in the bosom of African countries. It must administer fair and impartial justice, even though the influence of international politics on account of its reliance on funding by the major donor countries can never be wished away. As the Court plays a complementary role to national courts, and does not have its own law enforcement agencies, cooperation from State Parties and reliance on their goodwill is crucial. At base of all expectations of the ICC is the hope that the interests of powerless persons and voiceless victims would be well-served on behalf of the international community, and that the benefits of the rule of law, which may have evaded them on account of the realities of power within their own state, would, at last, be bestowed on them. This is a hope that the Court dare not disappoint, nor frustrate.

NOTES

¹ In 2003 the Darfur genocide claimed the lives of at least 350,000 to 400,000 people in 29 months. See, Eric Reeves, "Genocide in Darfur - How the Horror Began." September 3, 2005. Available at: <http://www.sudantribune.com/spip.php?article11445>. Accessed on 24/04/2014. Currently, the world the world is witnessing escalating violence in the Central African Republic. Between the 14th -16th of January 2014, 50 Muslims were killed in Bangui and an estimated 200,000 are internally displaced. Amnesty International, Central African Republic: "More than 50 Muslims killed in two attacks." January 24,2014. Available at: <http://www.amnesty.org/en/news/car-50-muslims-killed-2014-01-24> . Accessed On 24/04/2014; and Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, at the Fifteenth session, Human Rights Council, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. .Agenda Item 3, 18 January 2011. A/HRC/16/43/Add.4. To all intents and purposes, the ICC has not created a chilling effect on the commission of egregious crimes against citizens, and even genocide.

² The very first judgment of the ICC was passed on Thomas Lubanga Dyilo, a Congolese warlord, in March 2012.

³ In March 2014, Germain Katanga became the second individual to be convicted for his role in the 24 February 2003 attack of village of Bogoro, in the Ituri district of the Democratic Republic of the Congo (DRC).

⁴ Stephan Landsman, "Those Who Remember the Past May Not Be Condemned to Repeat It", (2000) as cited in "Pluralizing International Criminal Justice. From Nuremberg To The Hague: The Future Of International Criminal Justice." (2005) Michigan Law Review, Vol. 103, No. 6 in *Survey of Books Relating to the Law* (May, 2005),pp. 1295-1328, The Michigan Law Review Association

⁵ The Nuremberg Tribunal was established to prosecute 24 individuals alleged to be responsible for war crimes during WWII, and the International Military Tribunal for the Far East, IMTFE, more commonly known as the Tokyo Tribunal, was also established in 1946 to try 28 major war criminals (seven of whom were sentenced to death) on similar charges as persons tried at the Nuremberg tribunal. The tribunals were established by the USA and its allies of WWII, and the individuals concerned were leaders of Germany and Japan who served as military or political leaders.

⁶ Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (1950) Principle V.

⁷ The International Criminal Tribunal for the former Yugoslavia (ICTY) is an ad hoc tribunal established by the Security Council to investigate and prosecute grave war crimes committed in the territory of the former Yugoslavia during the conflicts in the Balkans since 1991. It was the first war crimes established after the Nuremberg and Tokyo trials. It was found that civilians were wounded and killed, raped, forced to flee their homes, enslaved and illegally detained- a situation which was in clear contravention to International Humanitarian law. The crime of genocide⁷ was also reported. The object of this tribunal was therefore to try individual responsible for these violations. An estimated 160 persons including heads of state, prime ministers, army chiefs-of-staff, interior ministers and many other high- and mid-level political, military and police leaders from various parties to the Yugoslav conflicts.⁷ Lower-ranking officials were referred to national courts as part of the Completion Strategy which began in 2003, which is aimed at building the capacities of national courts to try war crimes. The ICTY played a major role in discrediting the notion of collective responsibility by calling individuals to account for atrocities committed. It has also played a pivotal role in the development of international humanitarian law.

⁸ http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx Accessed on 24/04/2014.

⁹ Roy S. K. Lee, "The International Criminal Court: the making of the Rome Statute : issues, negotiations and results." Martinus Nijhoff Publishers, 1999.

¹⁰ The Rome Statute on the 18th of July 1998, and entered into force in July 2002 when the sixtieth state ratified it.

¹¹ Articles 12 and 13 explain the limits of the jurisdiction of the Court. Article 12(1) details, "A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Art. 5".

¹² Kirsch, Philippe. "The Role of the International Criminal Court in Enforcing International Criminal Law." American University International Law Review 22, No. 4 (2007), 539-547.

¹³ Daniel G. Partan and Pedrag Rogic, "Sovereignty and International Criminal Justice". (2003). Available at: http://www.javeriana.edu.co/juridicas/pub_rev/international_law/revista_1/cap.%203.pdf . Accessed on 12/05/2014.

¹⁴ Jean-Pierre Bemba constitutes one of the few public officials surrendered to the ICC. His arrest yielded political gains for his opponent, Joseph Kabila.

¹⁵ With regard to Ratione Temporis, the ICC has jurisdiction over only crimes committed after 1st July, 2002. If a state becomes party to the Rome Statute, the ICC has jurisdiction over only those crimes that were committed thereafter. However, the State can make a declaration accepting the jurisdiction of the Court retroactively.

¹⁶ Article 17. Article 17(2) determines unwillingness whilst 17(3) determines inability of the national court to investigate and prosecute.

¹⁷ This was despite the fact that UNSCR 2139 (2014) anticipated the possibility of such referral, and in para 12 of the Resolution, cautioned all parties thereon.

¹⁸ Tim Murithi, "The African Union and the International Criminal Court: An Embattled Relationship?" The institute for Justice and reconciliation, Policy brief, March 8, 2013.

¹⁹ This decision was taken at the 13th Annual Summit of Heads of State and Government in Sirte, Libya.

²⁰ According to Cuno J. Tarfusser²⁰, the pre-trial chamber does three main things; filter (Only solid and grave cases should go to trial; art. 15), “safeguard (Of the rights of the suspect, the defense and the victims. Principle of fair trial) and impulse (Confirm (or not) the charges against the accused and thus mark the transition from pre-trial to trial proceedings with all preliminary questions solved).”

²¹ A group has brought a case against British soldiers for brutalities committed by the soldiers against civilians in Iraq.

²² Kenneth Roth, “Africa attacks the International Criminal Court”, Available at :

<http://www.hrw.org/news/2014/01/14/africa-attacks-international-criminal-court>, Accessed 5/8/2014

²³ The Chief Prosecutor, Fatou Bensouda, is alleged to have in her possession the tape of a telephone conversation incriminating an associate of Kenyatta for attempting to bribe witnesses to withdraw their testimonies.

²⁴ In Afghanistan, the United States is said to have been responsible for the killing of civilians and continue to inflict “death, torture and other atrocities²⁴” on Afghans. The United States have failed to cooperate with investigations into these violations²⁴, Reuters reports. The Guantanamo Bay Detention Camp set up by the United States continues to be the centre for mass human rights violations including enforced disappearance and torture²⁴ even five years after it was scheduled to close²⁴.

²⁵ Resolution Assembly/AU/13(XXI)

²⁶ See Preamble of the Rome Statute of the International Criminal Court.

²⁷ Justice Ministers and Attorneys General of AU member countries met in Addis Ababa, Ethiopia on May 15 and 16, 2014, to consider a draft protocol to expand the authority of the African Court on Justice and Human Rights to include criminal jurisdiction over genocide, war crimes, and crimes against humanity. A proposal providing immunity for heads of state and senior government officials from prosecution for such crimes as part of the amended protocol has been vehemently opposed by CSOs on the continent. They sent a letter to the Governments and AU, urging a rejection of the proposal.